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The Impact of Weber

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THE IMPACT OF WEBER

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Editor's note *— In* Commentary, *which appears elsewhere in this edition, columnist Carl Rowan makes note of* Bakke *and* Weber, *two recent Supreme Court decisions. We have previously dealt with the* Bakke *case in our October 1977 and October 1978 editions. The following article by Geoffrey Simmons, a 1974 Phi Beta Kappa at Howard University, and a 1977 graduate of the Duke University School of Law, is an assessment of the* Weber *decision on affirmative action programs. Simmons is presently a Namaskar Fellow and is engaged in research dealing with new developments in employment opportunities for minorities. Formerly, he was staff aide in the Office of the Governor of North Carolina.*

By Geoffrey H. Simmons

By now most Americans have read or heard about the Supreme Court's June 27, 1979 decision in the case of *United Steelworkers of America* v. *Brian F. Weber*. Some people have disagreed with the court's holding while others have praised the court's 5-2 ruling. Most discussions have centered on the meaning of Section 703(d) of Title VII of the 1964 Civil Rights Act and whether a literal reading of that section, which was designed to outlaw any form of racial discrimination by an employer, would prohibit Kaiser Aluminum from establishing a race-conscious job training program to increase the number of Black skilled craft workers in its plant in Gramercy, La.

The majority of the justices said, in effect, that the spirit of the statute would permit the continuation of the type of program that was in operation in the Gramercy plant.

Business executives had watched the progression of *Weber* through the courts with much concern. They were anxious to ascertain the impact of the case on affirmative action. Before *Weber*, managers believed that they could not engage in race-conscious affirmative action programs to increase minority representation without the court first determining that there had been a history of past discrimination at their particular industry or business. And most personnel and legal counsel offices were convinced that their businesses would be making themselves liable for lawsuits if they admitted to participating in unlawful and discriminatory practices in the past.

Therefore, companies were hesitant to establish voluntary programs to increase opportunities for minorities that took race or sex into account. The dilemma was now apparent: "If we continue to have a racially imbalanced work-force we will be subject to lawsuits by minorities seeking employment and promotions; on the other hand, if we hire minorities to ameliorate the imbalance and promote minorities over whites without regard to seniority we will be accused of reverse discrimination." What can we do?" These kind of statements were common among corporate executives across the country.

In a survey commissioned by Barnhill-Hayes, Inc., (a management consulting firm specializing in affirmative action) during January of 1979, it was discovered that management's greatest affirmative action concerns were, first, being fined for past discrimination; second, losing government contracts; and third, adverse publicity. These factors underscore the importance of management seeking assurances when establishing programs, such as the one adopted at the Kaiser plant.

To understand the possible impact of *Weber* on the business community, one must examine the history of the case and the impressions of the attorneys who litigated the case before the Supreme Court. It is they who can best give the public guidance as to the method by which this case ought to be utilized.

One of the lawyers is Michael H. Gottesman, of the law firm of Bredhoff, Gottesman, Cohen and Weinberg, in Washington, D.C., who represented the Steelworkers Union.

While addressing members of the Labor and Employment Law Section of the American Bar Association in Dallas, Texas, last August, Gottesman discussed his impressions of *Weber* and the future of affirmative action in America.

"In 1973 the Steelworkers Union's Executive Board adopted a resolution that called for some radical changes in the collective bargaining rounds that were coming up the following year in the steel, aluminum and container industries," he said. Further, Gottesman noted the talks included the conversion of the seniority system, among other things. One of the important items mentioned, was a "provision that the union would seek quotas for the filling of craft training jobs throughout the industry. The Union put this program to the bargaining table in all three industries; negotiated for it and succeeded in getting quotas in the collective bargaining that year." The lawyers thought that it might be "prudent to get an umbrella over this revolutionary program." They later met with government officials and discussed the possibility of a consent decree. The aluminum and container industries had similar agreements in their contracts, according to Gottesman.

The program was a popular one and was greeted at several plants with virtually no opposition. Brian Weber was the only person, according to Gottesman, to bring suit contesting the program. The union met with lower level employees and the plan was approved and accepted. It was ironic that the Gramercy plant's new program was attacked by Weber, since it was at this very plant that the program was of substantial benefit to Blacks as well as whites. Except at Gramercy, several of the other plants involved in the affirmative action program had previously established some type of apprenticeship programs.

Gottesman pointed out that the aluminum and container industries were dominated by white males, while "minority populations in the steel industry exceeded the number of minorities in the labor-force, generally." However, there were very few Blacks or other minorities in the skilled craft unions. At the Gramercy plant, Black employees were less than two percent of its total number of craft workers, even though 43 percent of the surrounding Louisiana population was Black. An argument that there had been past discrimination in selecting persons for the skilled craft training programs at this plant was uninviting since there had never been a skilled craft training program.

The lower courts ruled in favor of Weber because there had been no past discrimination involved in the training program. Gottesman said, "it was the general wisdom of the lower courts, heretofore, that a race-conscious program designed to eliminate racial discrimination is not in violation of Title VII unless there is a finding of past discrimi-

nation or if there is a reasonable basis to believe that there has been discrimination."

The union argued before the Supreme Court that "prior to 1964 an industry could have any kind of race-conscious program that it wanted and certainly the 1964 Civil Rights Act was not designed to prohibit an industry from voluntarily establishing such a program to the benefit of Blacks." The union further argued that "legislative history indicates that the Congress did intend on this happening." To support this position, Gottesman compiled 70 pages of quotes from the legislative history. This point is very important in light of the fact that many articles about the *Weber* case make much ado about the dissent by Justice William Rehnquist and the fact it is saturated with legislative history while little legislative history is noted in the majority's decision.

What the Court Said in Weber

The Supreme Court did not outline the full range of permissible affirmative action programs. The court held that, wherever the line is, this case *(Weber)* falls within that line. There are four aspects about the program approved in *Weber* that may give guidance to the private sector:

- There were no white employees displaced by the program.
- The program was designed to be temporary. It was agreed that once the number of Blacks in the skilled craft jobs approximated the number of Blacks in the labor-force of the locality, the program would then be eliminated.
- The formula used to choose persons for the program was based on a 50/50 scheme. One Black would be chosen for every white chosen.
- The program was designed to eliminate a racial imbalance in an area of employment traditionally denied to women and racial minorities.

When examining the program at the Kaiser plant in Gramercy, one can see many possibilities for industry to be creative and ambitious in its quest to beef up affirmative action efforts.

Another lawyer, Thompson Powers, of the Washington law firm of Steptoe & Johnson, who was counsel for Kaiser, said, during the American Bar Association meeting in Dallas, that there are many possibilities after *Weber.* More middle management white-collar jobs could be filled by minorities using the arguments presented in the *Weber* case and paralleling those arguments to corporate business situations. Blacks and women who are seldom seen on Wall Street in brokerage firms or in large law firms may find themselves beneficiaries of the *Weber* decision, Powers noted.

There are many areas where minorities have been traditionally excluded that may now become accessible. Business executives in the South may find that by establishing training programs in industries, such as electronic parts-producing plants, they can increase Black employment in the areas where their firms are beginning to locate. Many of these areas have large Black labor-forces.

Powers noted that a company can find a way to increase affirmative action if there is a commitment to do so.

Weber makes it easier for a company to make such a commitment, says Charles Lawrence, III, co-author of a recent book, *The Bakke Case,* and visiting professor at the Harvard Law School. Lawrence says that *Weber* gives industry the green light to move forward on affirmative action. But he warns: there must still be incentives available for industry or it will not establish voluntary programs. Likewise, he states, "pressure must be put on industry to respond positively to *Weber.* Civil rights organizations should talk with industry leaders and get them to do now that which can legally be done. *Weber* frees industry to demonstrate its commitment to affirmative action without the threat of lawsuits claiming reverse discrimination."

Unanswered Questions

The Supreme Court did not decide whether an industry can fill 100% of its existing vacancies with minorities. The court refused to state definitively whether a goal can be set on hiring minorities that exceeds the number in the labor-force. The court did not define the limits for a "temporary" program. Government officials were not covered by *Weber.*

Eleanor Holmes Norton of the Equal Employment Opportunity Commission said recently that the Supreme Court left "great room for business to proceed . . . without looking over its shoulders for possible 'reverse discrimination' liability." She also said that her agency's new systematic program would not be directed at companies that use the *Weber* initiative to correct class-wide discrimination on their own, but would concentrate on companies that remained recalcitrant. □